



To the Honorable Council  
City of Norfolk, Virginia

September 15, 2015

From: David S. Freeman, AICP  
Director of General Services

**Subject:** Third Amendment to  
Encroachment Agreement for  
Outdoor Dining - Granby  
Restaurants, L.L.C. t/a Baxter's  
at 500 Granby Street.

Reviewed: Sabrina Joy Hogg  
Sabrina Joy-Hogg, Deputy City Manager

**Ward/Superward:** 2/6

Approved: Marcus D. Jones  
Marcus D. Jones, City Manager

**Item Number:**

**R-10**

I. **Recommendation:** Adopt Ordinance

II. **Applicant:** Granby Restaurants, L.L.C. t/a Baxter's  
Building Owner: 500 Granby L.L.C.

III. **Description:**

This agenda item is to amend and extend portions of prior encroachment agreements authorized by ordinance numbers 41,887, 41,929, 43,436, and 43,648. This will permit Granby Restaurants, L.L.C. t/a Baxter's ("Baxter's") permission to encroach three feet into Bute Street for the specific purpose of creating outdoor smoking for its patrons.

IV. **Analysis**

The Encroachment Agreement will permit Baxter's to install a rail and awning system for smoking and drinking, cigarette disposal receptacles, as well as a fire and service door in an area of approximately 349 square feet; thereby expanding total square footage to 1,084. The term of the encroachment will begin the effective date of the authorizing ordinance and terminate on December 31, 2016, the date of the original encroachment agreement (ordinance #41,929 adopted on July 12, 2005). It is subject to council revocation and the City of Norfolk ("City") remains named as additional insured.

| Hours of Operation           | Outdoor Seating Capacity   |
|------------------------------|--|
| Daily from 11 a.m. to 2 a.m. | 100 total capacity (including the proposed encroachment and current encroachment areas. This encroachment is without seating.) |

**V. Financial Impact**

Baxter's will pay the City rent at the rate of \$6.00 per square foot for 1,084 total square feet, in the amount of six thousand five hundred four dollars (\$6,504.00) annually, or five hundred forty-two dollars (\$542.00) monthly, beginning on the first of day of the month immediately following the effective date of the authorizing ordinance.

**VI. Environmental**

There are no known environmental issues associated with this property.

**VII. Community Outreach/Notification**

Public notification for this agenda item was conducted through the City's agenda notification process.

**VIII. Board/Commission Action**

The outdoor dining request was approved by the Design Review Committee.


**IX. Coordination/Outreach**

This ordinance has been coordinated with the Department of General Services – Office of Real Estate and the City Attorney's Office.

Supporting Material from the City Attorney's Office:

- Ordinance
- Encroachment Agreement



Form and Correctness Approved: 

By 

Office of the City Attorney

Contents Approved: 

By

DEPT. General Services

NORFOLK, VIRGINIA

## ORDINANCE No.

AN ORDINANCE PERMITTING BAXTER'S TO ENCROACH INTO THE CITY'S RIGHT OF WAY ON BUTE STREET AND APPROVING A THIRD AMENDED ENCROACHMENT AGREEMENT WITH GRANBY RESTAURANTS, L.L.C., T/A BAXTER'S, FOR PROPERTY AT 500 GRANBY STREET.

- - -

WHEREAS, by Ordinance No. 41,887 adopted on June 14, 2005, Ordinance No. 41,929 adopted on July 12, 2005, Ordinance No. 43,436 adopted on May 12, 2009 and Ordinance No. 43,648 adopted on November 3, 2009, Baxter's was permitted to encroach into the City's Right of Way; and

WHEREAS, changes to the encroachment area are needed to accommodate the City's light rail system; now, therefore,

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That Baxter's is given permission to encroach into Bute Street as shown on Exhibit A attached hereto and is permitted to place equipment and facilities thereon, including a rail and canopy system, installation of benches and cigarette disposal receptacles into the encroachment area.

Section 2:- That the encroachment area is for use by Baxter's patrons for drinking and smoking only.

Section 3:- That alterations in the encroachment areas may be allowed to remain but such will require an administrative review and the consent and approval of an authorized representative of the City's Department of Planning and Community Development.

Section 4:- That the terms and conditions of the Third Amended Encroachment Agreement, attached hereto, are hereby approved and the City Manager or his designee are authorized to execute the Agreement. The City Manager is authorized to modify terms of Agreement consistent with this ordinance.

Section 5:- That this ordinance shall be in effect from and after its adoption.

### **THIRD AMENDED ENCROACHMENT AGREEMENT**

This Third Amended Encroachment Agreement (hereinafter "Agreement") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2015, by and between the City of Norfolk, a municipal corporation of the Commonwealth of Virginia (hereinafter "City"), and Granby Restaurants, L.L.C. t/a Baxter's (hereinafter "Baxter's"). This Agreement is intended to amend and extend portions of prior agreements authorized by Ordinance numbers 41,887, 41,929, 43,436, and 43,648.

#### **WITNESSETH:**

1. **ENCROACHMENT AREA:** City hereby grants permission to Baxter's to encroach into the right of way of Bute Street in an area on the north side of the restaurant which totals 349 square feet, more or less, as shown on the shaded portion of Exhibit A attached hereto ("Encroachment Area"), for the purpose of outdoor smoking and drinking and no other purpose. City also grants Baxter's permission to install awning and railing as shown on the shaded portion of Exhibit A and permission to encroach 3' into Bute Street with a fire and service door.
2. **USE:** Baxter's shall be permitted to occupy the Encroachment Area for outdoor smoking and drinking uses in conjunction with the operation of the restaurant. Several benches for smokers will be permitted. Any other furniture will not be permitted without written City approval.
3. **TERM; TERMINATION:** The term of this amended permission to encroach granted hereby shall commence on the effective date of any authorizing ordinance, and shall terminate on December 31, 2016, the date specified by the original Encroachment Agreement (Ordinance #41,929). However, it is expressly understood that the permission granted hereby is expressly subject to the right of revocation by the Norfolk City Council, and that in the event of such



revocation, Baxter's, or its successors or assigns, if requested by City, shall remove the encroaching structures and shall cease using the Encroachment Area.

4. **COMPENSATION**: As compensation for the privilege of encroaching into the Bute Street right of way, Baxter's will pay City at the address designated in this paragraph additional annual rent of Two Thousand Ninety Four Dollars (\$2,094.00) per year, or One Hundred Seventy Four and 50/100 Dollars (\$174.50) beginning on the first day of the month immediately following the effective date of any authorizing ordinance. The compensation shall be paid by check made payable to the Norfolk City Treasurer and sent to the Office of Real Estate, Department of General Services, 232 E. Main Street, Suite 250, Norfolk, Virginia 23510. Payments made for the encroachments as described herein do not affect the process or amounts paid with respect to the encroachments permitted by the two prior ordinances.

5. **LATE FEES**: For any late payments received 15 days after the first of each month, Baxter's shall pay a late fee of five percent (5%) of the amount not paid when due.

6. **UTILITIES**: City shall not be responsible for utilities of any type used within the Encroachment Area. Baxter's shall pay all utility meter and utility services charges for all utilities, including but not limited to gas, electricity, water, telephone, sewer, and any other necessary to serve the Encroachment Area.

7. **REPAIRS**: Baxter's shall keep and maintain the Encroachment Area in good and complete state of repair and condition. Baxter's shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Encroachment Area in order to preserve and maintain the condition of the Encroachment Area. All such repairs and maintenance shall be performed in a good and workmanlike manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Encroachment Area. The City of Norfolk's

operation, maintenance, repair, or replacement of utilities located within the right of way may result in the removal, damage, or destruction of anything encroaching into the utility right of way.

The City of Norfolk is not responsible for any such damage, replacement, or reinstallation costs.

8. **REQUIREMENTS OF PUBLIC LAWS:** Baxter's shall suffer on waste or injury to the Encroachment Area and shall comply with all federal, state and municipal laws, ordinances and regulations applicable to the structure, use and occupancy of the Encroachment Area. In addition, Baxter's shall effect the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Encroachment Area.

9. **CITY'S RIGHT TO ENTER AND CURE:** City shall retain the right to enter upon the Encroachment Area at any time for the purpose of inspecting the Encroachment Area, ascertaining compliance with this Agreement, and making any repairs which City deems necessary as a consequence of any failure of Baxter's to meet their obligations under this Agreement. The cost of any such repairs shall be deemed additional compensation payable to the City on demand. Any entry upon the Encroachment Area or cure and repair shall be accomplished by City at reasonable times and in the exercise of reasonable discretion by the City. The making of any repairs by City shall not constitute a waiver by City of any right or remedy upon Baxter's default in making repairs.

10. **NOTICE:** Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid, addressed as follows:

City:

Office of Real Estate  
Department of General Services  
232 E. Main Street, Suite 250  
Norfolk VA 23510

Baxter's:

Mr. Baxter Simmons  
Granby Restaurant, L.L.C. t/a Baxter's  
P.O. Box 1861  
Norfolk VA 23501

With copies to:

City Attorney  
City Hall Building – 9<sup>th</sup> Floor  
810 Union Street  
Norfolk VA 23510

Either party hereto may change its address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand) or when postmarked (if sent properly by mail).

11. **ENVIRONMENTAL MATTERS:** Baxter's agrees that it will not introduce onto the Encroachment Area any toxic, hazardous or dangerous materials unless such material is stored, safeguarded, or used in accordance with applicable laws and regulations. Baxter's will not allow any air, water or noise pollution to occur in the Encroachment Area. Baxter's hereby agrees to use and occupy the Encroachment Area in a safe and reasonable manner and in accordance with applicable law.

City in turn agrees that Baxter's shall not be responsible or assume liability for environmental conditions existing on or about the Encroachment Area prior to Baxter's occupancy thereof under this Agreement.

12. **DESTRUCTION:** If the encroaching structures or any part thereof shall be damaged or destroyed by fire, lightning, vandalism, or by any other casualty or cause, the permission granted hereby shall be automatically terminated unless the parties agree, in writing, to continue to permit the encroachments granted by this Agreement.



13. **NON-LIABILITY OF CITY:** City shall not be liable for any damage or injury which may be sustained by Baxter's or any other person as a consequence of the failure, breakage, leakage or obstruction of the water plumbing, steam, gas, sewer, waste of spoil pipes, roof, drains, leaders, gutters, valleys downspouts or the like, or of the electrical, ventilation, air conditioning, gas power, conveyor, refrigeration, sprinkler, hearing or other systems, elevators or hoisting equipment, if any, upon the Encroachment Area, or by reason of the elements; or resulting from acts, conduct or omissions on the part of Baxter's, or their agents, employees, guests, licensees, invitees, assignees or successors, or on the part of any other person or entity.

14. **REMOVAL OF SNOW:** Baxter's agrees to remove or cause to be removed, as the need for the same arises, snow and ice from the Encroachment Area.

15. **ALTERATIONS:** Baxter's covenants and agrees that it will not make any improvements, changes installations, renovations, additions or alterations in and about the Encroachment Area without the prior written consent of the City other than the approval given by Norfolk's Design Review Committee on May 23, 2005 and Norfolk's Planning Commission on May 26, 2005. If Baxter's installs or makes any improvements, additions, installations, renovations, changes on or to the Encroachment Area with the approval of City, Baxter's hereby agrees to remove if requested by City, any improvements, additions, installations, renovations, changes on or to the Encroachment Area upon termination of this Agreement. In the event Baxter's fails to remove and is requested to do so by City, then City may remove the improvements, additions, installations, renovations, changes and Baxter's shall pay for the cost of such removal.

16. **ASSIGNMENT AND SUBLETTING:** City and Baxter's agree that the permission to encroach granted hereby may not be assigned by Baxter's without written approval from Norfolk's City Manager.

17. **SURRENDER BY BAXTER'S**: Baxter's will surrender possession of the Encroachment Area to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. Baxter's shall return the Encroachment Area to the City in as good order and condition as it was at the beginning of Baxter's use of the Encroachment Area. If Baxter's fails to remove and has been requested to remove all items from the Encroachment Area upon termination hereof, City is authorized to remove and dispose of any such personal property and Baxter's shall be liable to City for the cost of any removal and disposal.

18. **INSURANCE**: Baxter's shall maintain in full force and effect a combined single limit policy of bodily injury, death and property damage insurance that coincides with the existing policy for Baxter's of one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) aggregate insuring City and Baxter's against all liability arising out of the use, occupancy, or maintenance of the Encroachment Area and appurtenant areas, which policy shall be endorsed as primary insurance in favor of City naming the City, its officers, employees, agents and representatives as additional named insured, as evidenced by a Certificate of Insurance provided to the City within thirty (30) days after adoption of this Agreement. All insurance policies and certificates shall provide for thirty (30) days advance notice in writing to the City Manager if the insurance is cancelled or modified.

19. **FIXTURES**: City covenants and agrees that no part of the improvements constructed, erected or placed by Baxter's in the Encroachment Area shall be or become, or be considered as being, affixed to or a part of the right of way, and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of City and Baxter's to covenant and agree that all improvements of every kind and nature constructed, erected or placed by Baxter's in



the Encroachment Area shall be and remain the property of Baxter's, unless such improvements are not removed upon termination of this Agreement.

20. **ENVIRONMENTAL COMPLIANCE:**

(a) For purposes of this section:

(i) "Hazardous Substances" include any pollutants, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances as defined in or pursuant to the Resource and Conservation Recovery Act (42 U.S.C. SS6901 et seq.) (IIRCRAII), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. SS9601 et seq.) (CERCLAII) or any other federal, state, or local environmental law, ordinance, rule or regulation.

(ii) "Release" means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, disposing or dumping.

(iii) "Notice" means any summons, citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any authority of the Commonwealth of Virginia, the United States Environmental Protection Agency (USEPAII) or other federal, state or local agency or authority, or any other entity or any individual, concerning any intentional act or omission resulting or which may result in the Release of Hazardous Substances in the waters or onto the lands of the Commonwealth of Virginia, or into waters outside the jurisdiction of the Commonwealth of Virginia or into the "environment," as such terms are defined in CERCLA. "Notice" shall include the imposition of any lien on any real property, personal property or revenues of the Tenant, including but not limited to the Tenant's interest in the Leased Premises or any of Tenant's property located thereon, or any violation of federal, state or local environmental laws, ordinances, rules, regulations, governmental



actions, orders or permits, or any knowledge, after due inquiry and investigation, or any facts which could give rise to any of the above.

(b) To the extent that Baxter's may be permitted under applicable law to use the Encroachment Area for the generating, manufacture, refining, transporting, treatment, storage, handling, disposal, transfer or processing of Hazardous Substances, solid wastes or other dangerous or toxic substances, Baxter's shall insure that said use shall be conducted at all times strictly in accordance with applicable statutes, ordinances and governmental rules and regulations. Baxter's shall not cause or permit, as a result of any intentional or unintentional act or omission, a Release of Hazardous Substances in the Encroachment Area. If any such intentional or unintentional act or omission causes a Release of Hazardous Substance in the Encroachment Area, Baxter's shall promptly clean up and remediate such Release in accordance with the applicable federal, state and local regulations and to the reasonable satisfaction of the City.

(c) Baxter's shall comply with all applicable federal, state and local environmental laws, ordinances, rules and regulations, and shall obtain and comply with any and all permits required thereunder or any successor or new environmental laws. Upon the receipt of any Notice, Baxter's shall notify City promptly in writing, detailing all relevant facts and circumstances relating to the Notice.

(d) The requirements of this Section 20 shall apply to any successor in interest to Baxter's, whether due to merger, sale of assets or other business combination or change of control.

(e) Baxter's hereby agrees to defend (with counsel satisfactory to City) and indemnify and hold City harmless from and against any and all claims, losses, liabilities, damages and expenses (including, without limitation, reasonable cleanup costs and attorney's fees arising under this indemnity) which may arise directly or indirectly from any use or Release of Hazardous

Substances in the Encroachment Area and losses and claims against City resulting from Baxter's failure to comply strictly with the provisions of this Section 20. The provisions of this Section 20 shall survive the termination of this permission granted by this Agreement.

21. **LIENS OR ENCUMBRANCES**: If because of any act or omission of Baxter's, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Encroachment Area, Baxter's shall, at its own cost and expense, cause the same to be discharged of record or bonded within ninety (90) days after written notice from the City to Baxter's of the filing thereof, and Baxter's shall have the right to contest the validity of such lien if it so chooses.

22. **APPLICABLE LAW**: The permission granted by this Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Any suit or legal proceeding relating to permission granted hereby shall be brought only in the state or federal courts located in the Eastern District of Virginia.

23. **WAIVER OF TRIAL BY JURY**: To the extent permitted by law, city and Baxter's mutually waive their rights to trial by jury in any action, proceeding or counterclaim brought by either party against the other with respect to any dispute or claim arising out of the permission to encroach granted to Baxter's by this Agreement.

24. **OTHER REQUIREMENTS**: Baxter's agrees not to make any improvements, changes, renovation, additions or alterations in the Encroachment Area without the prior written consent of City. In addition:

(a) Baxter's shall comply with the City of Norfolk's (Downtown Outdoor Dining Policy) attached hereto as Exhibit "B".

(b) Baxter's shall comply with all requirements of the City of Norfolk Department of Public Health with respect to the use of the Encroachment Area.

(c) The use of the Encroachment Area shall be subject to the jurisdiction and review of the city of Norfolk's Design Review Committee.

(d) Baxter's use of the Encroachment Area shall not interfere with any water meters or sewer cleanouts.

(e) A trash can compatible in design and style with the table and chairs will be provided by Baxter's for the outdoor dining, and trash shall be removed daily.

(f) Tables and chairs will be arranged according to plan approved by Norfolk's Design Review Committee on October 22, 2009.

**IN WITNESS WHEREOF**, Parties have executed or have caused this Encroachment Agreement to be executed by their duly authorized officers and their corporate seals to be hereunto affixed and attested, all as of the date and year first above written.

**CITY OF NORFOLK**

By: \_\_\_\_\_  
City Manager

ATTEST:

\_\_\_\_\_  
City Clerk

**GRANBY RESTAURANT L.L.C. T/A  
BAXTER'S**

By: \_\_\_\_\_



CONTENTS APPROVED:

---

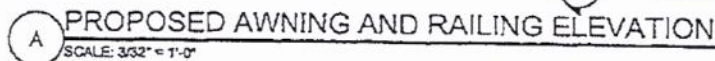
Department of General Services

FORM AND CORRECTNESS APPROVED:

---

Mary L. G. Nexsen  
Deputy City Attorney

600 GRANBY STREET, NORFOLK VA. 23510



SCALE: 3/32" = 1'-0"

SCALE: 3/32" = 1'-0"

SCALE: 1/4" = 1'-0"